LIBRARY

Supreme Court, U.S.
FILED
AUG 6 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 380

ANDREW DYMYTRYSHYN, *et al.*,

Appellants,

v.

P. A. ESPERDY, District Director of the New York District of the Immigration & Naturalization Service at New York, N. Y.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

JOHN J. ABT
299 Broadway
New York, N. Y. 10007
Attorney for Appellants

IRA GOLLOBIN
1441 Broadway
New York, N. Y.
Of Counsel

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Statute and Regulation Involved	4
Question Presented	5
Statement of the Case	5
The Questions Are Substantial	8
1. Denial of jury trial and the benefit of reasonable doubt	8
2. Attainder	11
Conclusion	12
Appendix—Opinions and Judgment Below:	
1. Opinion and Judgment of Three-Judge Court	13
2. Opinion of District Judge	19
3. Opinion on Motion for Rehearing	22

Citations

CASES:

Aptheker v. Secretary of State, 378 U.S. 500	8
Barton v. Sentner, 353 U.S. 963	10
Communist Party v. S.A.C.B., 367 U.S. 1	11
Cox v. United States, 332 U.S. 442	9
Florida Lime Growers v. Jacobsen, 362 U.S. 73	3
Galvan v. Press, 347 U.S. 522	11

PAGE

Hamilton v. Board of Regents, 293 U.S. 245 10

Heckler v. Shepard, 243 F. Supp. 847 11

Idlewild Liquor Corp. v. Epstein, 370 U.S. 713 .. 3

Maggio v. Zetiz, 333 U.S. 56 8

Sentner v. Colarelli, 145 F. Supp. 569 10

Siminoff v. Esperdy, 267 F. 2d 705 10

Tormey v. Immigration & Naturalization Service, No. 122, this term 5, 11

United States v. Brown, 381 U.S. 11, 12

United States v. England, 347 F. 2d 425 8

United States v. Spector, 343 U.S. 169 ..... 8, 9

United States v. Witkovich, 353 U.S. 194 7

United Steel Workers v. Bagwell, 383 F. 2d 492 .. 11

Wong Wing v. United States, 163 U.S. 228 8

Woodby v. Immigration & Naturalization Service, 385 U.S. 276 8

Yakus v. United States, 321 U.S. 414 ..... 9, 11

CONSTITUTION:

Attainder 7, 11

Due Process 7, 8

Sixth Amendment 7, 8

PAGE

STATUTES:

Immigration and Nationality Act
Sec. 106, 8 U.S.C. 1105a 8, 10
Sec. 241, 8 U.S.C. 1251 ..... 5, 11, 12
Sec. 242(d), 8 U.S.C. 1252(d) ..... *passim*
Sec. 242(e), 8 U.S.C. 1252(e) 8

Landrum-Griffin Act 12

5 U.S.C. 702-06 2

28 U.S.C.
Sec. 1253 3
Sec. 2282 2
Sec. 2284 2

MISCELLANEOUS:

8 C.F.R. 242.2(d) 5

Fraenkel, Can the Administrative Process Evade the Sixth Amendment? 1 Syracuse L. Rev. 173 8

Supreme Court of the United States

IN THE

October Term, 1968

No.

ANDREW DYMYTRYSHYN, *et al.*,

Appellants,

v.

P. A. ESPERDY, District Director of the New York District of the Immigration & Naturalization Service at New York, N.Y.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Andrew Dymytryshyn, Alexander Bittelman, Betty Gannett Tormey, Rose Lightcap Raynes, Lena Scherer and Felix Kusman, appellants, having appealed from the final judgment of a three-judge court of the United States District Court for the Southern District of New York granting summary judgment for appellee on the constitutional issues before the court, and denying appellants' motion for summary judgment on these issues, submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinions Below

The opinions below (R. 22; 23; 26;[1] Appendix, *infra*) have not yet been officially reported.

Jurisdiction

Appellants, resident aliens who are the subject of unexecuted deportation orders, brought this action in the United States District Court for the Southern District of New York for a declaratory judgment and an injunction against enforcement of orders for their supervision issued by appellee under section 242(d) of the Immigration and Nationality Act, 8 U.S.C. 1252(d) (the Statute). Relief was sought on the grounds both that the Statute is unconstitutional and that it does not authorize the restraints on appellants' liberty prescribed by the orders of supervision. The action was brought under 8 U.S.C. 1329, 5 U.S.C. 702-06, 28 U.S.C. 2282 and 28 U.S.C. 2284. (R. 5.)

A three-judge court was convened and heard appellants' motion and appellee's cross-motion for summary judgment. On June 12, 1968, the court filed an opinion holding that it "was properly convened upon a reading of the complaint and the determination that the constitutional questions raised were substantial." The opinion proceeded to direct summary judgment for appellee "on the constitutional issues," to deny "[p]laintiffs' motion for summary judgment on these issues," to remand the case to the member of the court to whom it had been initially assigned "for determination as to the propriety of the supervision orders," and to direct the entry of judgment accordingly. (R. 22, pp. 4, 8; *infra*, pp. 15, 17-18.)

On the same day, the district judge to whom the case was remanded filed an opinion deciding the non-constitu-

[1] The record is cited by document number followed, where appropriate, by the page number of the document referred to.

tional issue adversely to appellants and directing the entry of judgment "dismissing plaintiffs' complaint in its entirety" (R. 23, pp. 4-5; *infra*, p. 20).

Appellants moved for a rehearing, for decision of the non-constitutional issue by the three-judge court, and for alteration of the judgments accordingly (R. 24). The motion was denied on July 8, 1968 (R. 26; *infra*, pp. 21-22).

The judgment directed by the three-judge court opinion of June 12, 1968, was entered July 16, 1968 (R. 22, p. 8; *infra*, p. 18).[2] The notice of appeal from that judgment was filed July 17, 1968 (R. 28).

The refusal of the three-judge court to decide the non-constitutional question presented by appellants was plainly erroneous.[3] However, in the interest of expedition and to remove any doubt as to the Court's jurisdiction to dispose of the case on the merits, appellants have abandoned their non-constitutional contention.[4] With that issue out of the case, the judgment of the three-judge court on the constitutional issues is an order denying appellants an injunction, and is appealable under 28 U.S.C. 1253. *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73.

---

[2] By oversight of the clerk, judgment was not entered at the time the opinion was filed.

[3] Since the criteria for convening a three-judge court were met, "the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case." *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715. Appellants' objections to the procedure adopted below are spelled out in their motion for rehearing (R. 24).

[4] Appellants are not appealing the judgment of the single judge to the Court of Appeals, and their notice of appeal to this Court (R. 28) is confined to the constitutional questions.

Statute and Regulation Involved

Section 242(d) of the Immigration and Nationality Act, 8 U.S.C. 1252(d), 68 Stat. 1232, provides as follows:

> Any alien against whom a final order of deportation as defined in subsection (c) of this section heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality and circumstances, habits, associations and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or, imprisoned not more than one year, or both.

8 C.F.R. 242.2(d) provides:

> *Supervision.* Until an alien against whom a final order of deportation has been outstanding for more than six months is deported, he shall be subject to supervision by a district director, acting district director, or deputy district director, and required to comply with the provisions of section 242(d) of the Act relating to his availability for deportation.

Question Presented

Whether the Statute is unconstitutional on its face or as applied to appellants.

Statement of the Case

The Statute, as implemented by 8 C.F.R. 242.2(d), authorizes the appellee to issue orders for the supervision of aliens against whom final orders of deportation have been outstanding for more than six months. The wilful violation of an order is punishable by imprisonment for one year and a fine of $1,000.

The relevant facts are not in dispute.

Appellants are aliens who were admitted to the United States for permanent residence many years ago and who have resided here ever since. Each appellant is subject to a final order of deportation, issued pursuant to section 241(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), as an alien who, sometime after entry, was a member of the Communist Party of the United States.[5] Each appellant is also subject to an order of supervision issued by the appellee and subsequently amended by him. (R. 23, p. 2; *infra*, p. 19.)

Pertinent facts with respect to each appellant are shown in the following table (*ibid.*).

---

[5] Proceedings by appellant Tormey challenging the constitutionality of section 241(a)(6)(C)(i) are before the Court on her petition for certiorari. *Tormey* v. *Immigration & Naturalization Service*, No. 122, this term. A decision there that the statute under which appellants were ordered deported is unconstitutional would, of course, render the present case moot.

	Year Admitted	Age at Admission	Order of Deportation	Order of Supervision	Present Age
Dymytryshyn	1915	23	1951	1952	76
Bittelman	1912	22	1952	1957	78
Tormey	1914	8	1952	1953	62
Lightcap	1913	10	1951	1952	65
Scherer	1913	13	1958	1959	68
Kusman	1939	30	1953	1954	59

The U.S.S.R., which now includes the countries of origin of all the appellants but Tormey, does not recognize them as citizens and refuses to admit them. Poland, Tormey's country of origin, takes the same position with respect to her. The Service has been unable to effect the deportation of appellants to any other country. (R. 11, pp. 2-4.) As the district judge below found, "there does not appear to be any reasonable chance in the foreseeable future" of deporting appellants (R. 23, p. 3; *infra*, p. 20).

The orders of supervision in effect at the commencement of this proceeding, among other things, (1) prohibited appellants from travelling outside the New York Immigration District (the State of New York) for more than 48 hours without first having notified the Immigration and Naturalization Service of the dates and places of the proposed travel, and (2) required appellants to report in person at the district office of the Service on a specified day of the week at three month intervals (R. 11, p. 2; R. 9, exhibits annexed to affidavits).

At the suggestion of the court below on the argument, the appellee modified the orders of supervision. As modified, they add New Jersey and Connecticut to New York as states where appellants are free to travel, and prohibit travel elsewhere for more than 72 hours without notification to the Service of the dates and places of the proposed travel not later than 72 hours after departure. The modified orders also reduce the personal reporting requirement from four times to once a year. (R. 23, pp. 2-3; *infra*, p. 19.)

In the court below, appellants sought injunctive and declaratory relief against the orders of supervision on the following grounds:

1. Because of the improbability that the orders of deportation can ever be executed, and in view of appellants' ages, family ties and economic circumstances, the personal reporting and travel-notice requirements of the orders of supervision, both in their original form and as modified after argument, are not reasonably required to assure the the availability of appellants for deportation. Hence these requirements are not authorized by the Statute as construed in *United States* v. *Witkovich,* 353 U.S. 194. (R. 12, pp. 2-6; R. 19.)

2. The Statute is unconstitutional, on its face and as applied.

(a) The Statute deprives the accused in a prosecution for violating an order of supervision of a jury trial on the issue of his deportability. It likewise denies him the benefit of the requirement of proof of deportability beyond a reasonable doubt. In these respects, the Statute violates the Sixth Amendment and procedural due process. (R. 12, pp. 16-11.)

(b) The Statute, as applied to appellants, is a bill of attainder (R. 12, pp. 12-13).

(c) The Statute, if construed to authorize the orders of supervision, denies appellants substantive due process by imposing arbitrary restraints on their liberty (R. 12, pp. 11-12).

Appellants recognize that abandonment of their non-constitutional contention (point 1 above) entails abandonment of its constitutional corollary (point 2(c)). Accordingly, in this Court, the issues are confined to those stated in points 2(a) and 2(b) above.

The Questions Are Substantial

1. Denial of jury trial and the benefit of reasonable doubt.

The Statute punishes violation of an order of supervision by fine and imprisonment. Under the Statute, an individual is not, and under the Constitution he cannot be, subject to an order of supervision unless he is a deportable alien. Hence the deportability of the accused is an element of the offense of violating such an order. Yet this element is not submitted to the jury. Nor need it be proved beyond reasonable doubt.

Instead, the Statute makes the existence of a final order of deportation conclusive on the issue of deportability unless the accused, at his criminal trial, elects to challenge the validity of the order pursuant to section 106(a)(6) of the Act. All that the challenge gets him, however, is a *bench* trial on the issue of alienage and, if that is established, review by the trial judge of the administrative record to determine whether the order was supported by "reasonable, substantial and probative evidence."[6]

By withdrawing the issue of deportability from the jury and dispensing with the requirement that it be proved beyond a reasonable doubt, the Statute violates the Sixth Amendment and due process. *United States* v. *Spector*, 343 U.S. 169, 174-80 (dissenting opinion of Justice Jackson); *Wong Wing* v. *United States*, 163 U.S. 228; *United States* v. *England*, 347 F. 2d 425, 438-43; *Maggio* v. *Zeitz*, 333 U.S. 56, 78-79 (opinion of Justice Black); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 518 (concurring opinion of Justice Black); Fraenkel, Can the Administrative Process Evade the Sixth Amendment? 1 Syracuse L. Rev. 173.

United States v. *Spector, supra,* involved an indictment under section 242(e) of the Act, making it a crime for an alien against whom a final order of deportation is outstand-

---

[6] This standard falls short of the requirement in a criminal case of proof beyond a reasonable doubt. *Woodby* v. *Immigration & Naturalization Service*, 385 U.S. 276, 284-86.

ing to fail to take steps to effectuate his departure. That section is identical with the Statute in its treatment of the issue of deportability. The majority in *Spector* declined to decide whether the section was unconstitutional on this account, but reserved the question since counsel had not raised it.

Justice Jackson, joined by Justice Frankfurter, in a dissenting opinion with which Justice Black (at 174, n. 2) expressed full agreement, held that the statute was unconstitutional, stating (at 177-78):

> "We must not forget that, while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal footing with the citizen when he is charged with crime. If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

The *Spector* majority, in reserving the question dealt with by Justice Jackson, noted (at 172-73), "cf. *Yakus* v. *United States,* 321 U.S. 414; *Cox* v. *United States,* 332 U.S. 442." These cases are distinguishable, as is evident from the fact that Justices Jackson, Frankfurter and Black joined or concurred with the majority in both.

Yakus held that a statute may constitutionally impose criminal penalties for violation of an administrative regulation (there, a maximum price order) without requiring submission of the issue of its validity to the jury. This principle applies to administrative *rules* of general application for the regulation of future conduct. It does not apply, as Justice Jackson pointed out (*Spector* at 179), to administrative *adjudication* of the past conduct of specific persons.

Cox held that the accused in a prosecution for refusal to report for induction is not entitled to a jury trial on

the issue of his classification. The draft cases, however, are *sui generis*. Since Congress may require military service of all, exemptions are acts of grace which may be granted on such conditions as it chooses to exact. *Hamilton* v. *Board of Regents*, 293 U.S. 245, 266-67 (concurring opinion).

The three judge court below found the jury trial question substantial (R. 22, p. 4) in deference to *Siminoff* v. *Esperdy*, 267 F. 2d 705 (C.A. 2), which had so held in a proceeding to enjoin enforcement of provisions of earlier orders of supervision issued by appellee.[7] However, the court below did not decide the question, but dismissed it as premature because (R. 22, p. 5) "these plaintiffs have neither violated their supervision orders . . . nor asserted any immediate intention of doing so." *Infra*, p. 15.

But to require these elderly appellants to risk a year in jail as the price of litigating their claimed deprivation of constitutional rights would effectively deny them judicial consideration of their claim.

The decision below is contrary to *Barton* v. *Sentner*, 353 U.S. 963, affirming *Sentner* v. *Colarelli*, 145 F. Supp. 569, and to *Siminoff* v. *Esperdy*, *supra*. In both, the enforcement of challenged provisions of orders of supervision was enjoined as unauthorized by the Statute at the suit of aliens who had neither violated nor threatened to violate the orders. If those proceedings were not premature, appellants' challenge to the orders of supervision on constitutional grounds is likewise ripe for adjudication.[8]

---

[7] *Siminoff*, reversing a single district judge, enjoined enforcement of the challenged provisions of the orders on the ground that they were unauthorized, but did not pass on the constitutional question for lack of jurisdiction.

[8] It should be noted that the enactment subsequent to the decision in *Spector* of section 106(a)(6) of the Act (*supra*, p. 8) has rendered inapposite the statement of the majority in that case (at 172) that, "It will be time to consider whether the validity of the order of deportation may be tried in the criminal trial either by the court or by the jury when and if the appellee seeks to have it tried" (citations omitted).

In this respect, the decision below of the three judge court is inconsistent with that of the single judge. For the latter did not dismiss appellants' non-constitutional contention as premature, but adjudicated it on the merits (R. 23, pp. 3-4; *infra*, p. 20).

"To relegate the parties to another time and place in order to raise these constitutional objections is to fashion an extremely harsh rule to fit the Communist Party but no one else. Default means the risk of criminal prosecution. No person, I think, should be forced to wait until his default to raise his constitutional objection . . . Never before, I believe have we forced that choice on a litigant." *Communist Party* v. *S.A.C.B.*, 367 U.S. 1, 189 (dissenting opinion of Justice Douglas). Cf. *Yakus* v. *United States*, 321 U.S. 414, 437-38 and cases there cited; *United Steel Workers* v. *Bagwell*, 383 F. 2d 492; *Heckler* v. *Shepard*, 243 F. Supp. 841.

Plainly, both the question of prematurity and the underlying constitutional question are substantial and merit plenary consideration.

2. Attainder.

Appellants were ordered deported pursuant to section 241(a)(6)(C)(i) of the Act which provides for the deportation of aliens who, after entry, were members of the Communist Party.

But for the rule of *Galvan* v. *Press*, 347 U.S. 522, 531, that deportation does not constitute punishment, this section would be invalid as a bill of attainder. *United States* v. *Brown*, 381 U.S. 437. Appellants believe that *Galvan* v. *Press* has lost its authority for the reasons stated in the petition for certiorari in *Tormey* v. *Immigration & Naturalization Service*, *supra*, at pp. 13-14.

But assuming that the rule of *Galvan* still prevails, it is inapplicable here. For the Statute, which makes wilful violation of an order of supervision a crime, undeniably

does inflict punishment. Appellants are subject to punishment under the Statute only because they were ordered deported as members of the Communist Party. Thus the Statute imposes punishment upon them on account of such membership. Such legislation is a bill of attainder. *United States* v. *Brown, supra.*

The court below (R. 22, p. 7; *infra,* p. 17), reading the Statute as a discrete enactment, said that "the class defined is that of all deportable aliens." But the Statute is only one element in a statutory scheme of which section 241(a)(6)(C)(i) forms an integral part. Appellants would not be liable to punishment under the Statute had they not been found to have been members of the Communist Party. Hence Communist Party membership is no less relevant to the punishment of appellants under the Statute than it was to the punishment of the accused in *United States* v. *Brown, supra,* under section 504 of the Landrum-Griffin Act.

Like section 504, therefore, the statutory scheme of which the Statute is a part violates the principle that Congress must accomplish its objectives by "rules of general application" and "cannot specify the people upon whom the sanction it prescribes is to be levied." *Brown,* at 461.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

JOHN J. ABT
299 Broadway
New York, N.Y. 10007
Attorney for Appellants

IRA GOLLOBIN
1441 Broadway
New York, N.Y.
Of Counsel

APPENDIX

Opinions and Judgment Below

1. Opinion and Judgment of Three-Judge Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 2375

ANDREW DYMYTRYSHYN, et al.,

Plaintiffs,

against

P. A. ESPERDY, District Director of the New York District of the Immigration and Naturalization Service at New York, N. Y.,

Defendant.

(Filed June 12, 1968)

Appearances:

JOHN J. ABT and IRA GOLLOBIN, of New York, N. Y., Attorneys for Plaintiffs.

ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York, Attorney for Defendant;

FRANCIS J. LYONS, Special Assistant United States Attorney, Southern District of New York, Of Counsel.

Before KAUFMAN, Circuit Judge, and
METZNER and POLLACK, District Judges.

METZNER, *D. J.*:

Plaintiffs, against whom final orders of deportation have been entered, seek a declaratory judgment and injunctive relief against the orders of supervision issued by the defendant. It is their contention that the statutory provisions under which these orders were issued are violative of the Fifth and Sixth Amendments and the bill of attainder clause in Article I, § 9, of the Constitution. They further contend that the provisions of the orders of supervision are not reasonably related to the availability of plaintiffs for deportation and are therefore not authorized by § 242(d) of the Immigration and Nationality Act (8 U.S.C. § 1252 (d)). Both parties move for summary judgment.

§ 242(d) provides that if a final order of deportation has been outstanding against an alien for more than six months the Attorney General shall prescribe regulations for the supervision of such aliens. A wilful failure to comply with an order issued pursuant to such regulations subjects the alien to criminal sanctions of fine and imprisonment.

Two plaintiffs were ordered deported in 1951, two in 1952, one in 1953 and one in 1958. Each order was based on a finding that the individual was an alien who after entry into the United States had been a voluntary, knowing member of the Communist Party. The validity of these orders of deportation is not challenged in this proceeding.

The Service has been unable to effect the deportation of the plaintiffs and they have thus been subjected to the orders of supervision as provided in § 242(d).

Judicial review of the order of deportation is limited to the administrative record and the order is conclusive "if supported by reasonable, substantial and probative evidence on the record considered as a whole." § 106(a)(4) and (6). Review is had either by petition to the Court of Appeals (§ 106(a) and 28 U.S.C. § 2341 et seq.) or if such review has not been sought, then by motion in a criminal

proceeding against an alien charged with violation of a supervision order (§ 106(a)(6)). Such motion must be heard and determined by the court before a jury trial of the criminal charge.

On an earlier application by some of these plaintiffs, the Court of Appeals ordered that a provision of the then existing orders of supervision be modified, but reserved for a three-judge district court under 28 U.S.C. § 2282 the claimed unconstitutionality of § 242(d) "in that it imposes criminal sanctions on an alien's failure to comply with orders designed to further his deportation, but does not require the United States to prove at the criminal trial the alien's deportability." *Siminoff* v. *Esperdy*, 267 F.2d 705, 707 (2d Cir. 1959).

Following the suggestion of the Court of Appeals, this action was instituted and on motion made by plaintiffs and concurred in by the defendant a three-judge court was convened.

The three-judge court was properly convened upon a reading of the complaint and the determination that the constitutional questions raised were substantial. *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962). However, after reviewing the case on the merits, we have come to the conclusion that the plaintiffs presently before us lack the requisite standing and ripeness to precipitate the adjudication of the constitutional issues raised. The provision they attack is essentially a rule of criminal procedure, establishing a standard of proof and delineating the jury's province in prosecutions for violation of supervision orders. Yet these plaintiffs have neither violated their supervision orders, which have been in effect for many years, nor asserted any immediate intention of doing so. There is no immediate threat of prosecution. Any criminal prosecutions against them are purely hypothetical. Cf. *Evers* v. *Dwyer*, 358 U.S. 202 (1958). To grant plaintiffs standing to raise this question would open any rule of criminal pro-

cedure to attack by anyone, on the theory that a hypothetical criminal prosecution against him might someday be governed by such rule. Clearly, a more immediate interest is required.

Plaintiffs' reliance upon such cases as *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); *United Steelworkers* v. *Bagwell,* 383 F.2d 492 (4th Cir. 1967), and *Heckler* v. *Shepard,* 243 F. Supp. 841 (D. Idaho 1965), is misplaced for two reasons. First, in each of those cases there was a proposed form of conduct which was inhibited or a prosecution threatened that affected First Amendment freedoms. The doctrine of "chilling effect" enunciated in *Dombrowski* has not been extended to situations like the present one in which the plaintiffs neither propose acts which might violate a criminal statute nor have been subjected to actual threat of prosecution—the injury is a mere possibility, a speculation. See Note, Declaratory Relief in the Criminal Law, 80 Harv. L. Rev. 1490, 1506 and 1508 (1967). Second, and more important, the plaintiffs in all of those cases were attacking the constitutionality of statutes which directly regulated their conduct. Here, the plaintiffs do not dispute the right of the Attorney General to regulate their conduct by issuing supervision orders nor his right to prosecute them for violations of such orders. They attack only the procedure which would be used if they were prosecuted. Even if the doctrine of *Dombrowski* is extended, it is doubtful that the procedure authorized by § 106(a) alone adds substantially to any chilling effect on plaintiffs' enjoyment of their rights. We hold that the constitutional attack on § 242(d) is not ripe for adjudication upon the motion of these plaintiffs.

The plaintiffs also assert that § 242(d) constitutes a bill of attainder as applied to them, since it imposes criminal sanctions upon deportable aliens and they have been found deportable solely because of their past membership

in the Communist Party. Even assuming that this assertion is properly presented to us, because it attacks the criminal prescription itself, we cannot accept it on the merits. Plaintiffs rely on *United States* v. *Brown,* 381 U.S. 437 (1965), which held a provision imposing criminal sanctions upon labor union officials who were Communist Party members to be a bill of attainder. But the rule of *Brown* is not sufficiently broad to reach this case. There, the specification of Communists in the statute served only the function of defining those who were charged with a crime. In the present case, the class defined is that of all deportable aliens and a specific act in violation of admittedly valid orders is required before criminal sanctions are imposed. The reason for deportability is not in issue in such a proceeding. What plaintiffs really attack here is the determination of deportability premised solely upon party membership, an argument already rejected by the Supreme Court. *Galvan* v. *Press,* 347 U.S. 522 (1954).

Since we have rejected both of plaintiffs' constitutional arguments, we are presented with the question of the proper disposition of plaintiffs' non-constitutional challenge to the scope of the supervision orders. We think this issue should be determined by the single judge who convened this court. The three-judge court statutes must be read "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States,* 312 U.S. 246, 251 (1941). Cf. *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965). The Supreme Court has not favored bypassing review by the Court of Appeals and we see no reason in the policies behind § 2282 why plaintiffs should have direct immediate review by the Supreme Court on the issue of the validity of the supervision orders.

Accordingly, we grant summary judgment for the defendant on the constitutional issues before the three-judge

court for the reasons stated, and remand to the single judge for determination as to the propriety of the supervision orders. Plaintiffs' motion for summary judgment on these issues is denied. Judgment will be entered accordingly.

It is so ordered.

Dated: New York, N. Y.
June 12, 1968

/s/ IRVING R. KAUFMAN
U. S. C. J.

/s/ CHARLES M. METZNER
U. S. D. J.

/s/ MILTON POLLACK
U. S. D. J.

Judgment entered 7-16-68.

/s/ JOHN J. OLEAR, JR.
Clerk

2. Opinion of District Judge

(Filed June 12, 1968. Caption and Appearances omitted.)

METZNER, D. J.:

This matter was argued before a statutory three-judge court whose opinion on the constitutional issues raised has been filed simultaneously with this opinion. That court reserved the disposition of the nonconstitutional issue for the single judge before whom the original application for a statutory court had been made.

The question presented is whether the reporting and travel notice requirements of the supervision orders are reasonably related to the availability of the plaintiffs for deportation. *United States* v. *Witkovich,* 353 U.S. 194 (1957).

The pertinent information regarding each plaintiff is as follows:

	Year Admitted	Age at Admission	Order of Deportation	Order of Supervision	Present Age
Dymytryshyn	1915	23	1951	1952	76
Bittelman	1912	22	1952	1957	78
Tormey	1914	8	1952	1953	62
Lightcap	1913	10	1951	1952	65
Scherer	1913	13	1958	1959	68
Kusman	1939	30	1953	1954	59

On the argument before this court of the motions for summary judgment, inquiry was made of the defendant as to whether modifications could not be made in the existing orders of supervision. As a result, the orders were amended to provide that a plaintiff shall not travel outside New York, New Jersey and Connecticut for a period in excess of 72 hours without notifying the Immigration Service within 72 hours after the journey commences of the dates

and places of proposed travel. Each plaintiff need report personally only once each year.

Plaintiffs have advised the court that the orders of supervision as amended are not satisfactory and they press their motions for summary judgment.

§ 242(d) of the Immigration and Nationality Act (8 U.S.C. § 1252(d)), as amended, provides that an alien, subject to a final order of deportation unexecuted for more than six months, shall be subject to supervision under regulations prescribed by the Attorney General. The statute specifically refers to the inclusion in the regulations of provisions for reporting to the Immigration Service and for reasonable written restrictions on the alien's conduct or activities.

Although the Service has not been able to effect deportation for a long period of time, and there does not appear to be any reasonable chance in the foreseeable future, this of itself cannot void the orders of supervision. The statutory duty to deport still exists and the defendant must be in a position to comply with the mandate when and if the opportunity presents itself. On the other hand, since a lifetime of surveillance may be the prospect in these cases, the orders of supervision must be carefully reviewed. *Sentner* v. *Barton*, 353 U.S. 963 (1957); *United States* v. *Witkovich*, *supra*.

The provision for personal reporting once a year is not a burdensome or unreasonable requirement. Complete freedom of travel by the aliens without reporting is permitted within the state of residence, New York, and the two adjoining states of New Jersey and Connecticut. It is only when travel of more than 72 hours' duration is intended outside this area that reporting is necessary, and then only within 72 hours after commencing such travel.

Thus plaintiffs may respond to emergent situations without fear of violating orders. On the other hand, long trips require time to return to New York and time for adequate notice to report to the Service must be made. The orders of supervision are reasonable.

The plaintiff's motion for summary judgment is denied. Judgment shall be entered dismissing plaintiffs' complaint in its entirety. Settle order containing the terms of the supervision orders as modified after argument.

So ordered.

Dated: New York, N. Y.
June 12, 1968.

/s/ CHARLES M. METZNER,
U. S. D. J.

3. Opinion on Motion for Rehearing

(Filed July 8, 1968. Caption omitted.)

Before:

KAUFMAN, *Circuit Judge,* and
METZNER and POLLACK, *District Judges.*

METZNER, *D. J.*:

The motion for a rehearing and to alter the judgments entered herein on June 12, 1968 is denied. While the recent Supreme Court cases cited by plaintiffs indicate that a three-judge court once convened under 28 U.S.C. § 2282 has jurisdiction to decide nonconstitutional claims, none holds that in every case such jurisdiction must be exercised. The claim attacking the reasonableness of the supervision orders does not require a three-judge court. It seeks separate and distinct relief from that sought under the constitutional claim, rather than serving merely as alternative grounds for the same relief. In such circumstances, the three-judge court has discretion to remand such a claim to a single judge. See 3A Moore, Federal Practice ¶ 18.07[2] and cases cited therein.

The court's disposition does not deny plaintiffs appellate review. Nothing in *Siminoff* v. *Esperdy,* 267 F.2d 705 (2d Cir. 1959), requires that in order to appeal the single judge's determination herein to the Court of Appeals the plaintiffs must forego appeal of the three-judge court's decision, or vice versa.

Finally, plaintiffs argue that bifurcation of the questions raised herein has eliminated consideration by the three-judge court of their additional constitutional claim that if the supervision orders are held to be valid under § 242(d) of the Immigration and Nationality Act (as they have been), then the statute violates due process. Plaintiffs never had any right to such adjudication by three judges, as that particular constitutional claim was never found to be substantial. The only constitutional claim

found to be substantial was the one directed to the lack of necessity of jury consideration of the alien's deportability. The claim that § 242(d) constituted a bill of attainder was disposed of on an assumption that the claim was properly presented to the three-judge court. We can assume that the single judge, in passing on the supervision orders, considered and rejected the claim that § 242(d) violated due process.

So ordered.

Dated: New York, N.Y.
July 8, 1968

/s/ IRVING R. KAUFMAN
U. S. C. J.

/s/ CHARLES M. METZNER
U. S. D. J.

/s/ MILTON POLLACK
U. S. D. J.